United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-1164

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1164

UNITED STATES OF AMERICA,

Appellant,

-against-

FRED FERNANDEZ,

Appellee.

On Appeal from the United States
District Court for the Eastern
District of New York

BRIEF FOR APPELLEE

ELEANOR JACKSON PIEL
Attorney for Appellee
36 West 44th Street
New York, N. Y. 10036
MU 2-8288

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PRELIMINARY STATEMENT

This is the third time this case--in which the defendant is charged with armed bank robbery [18 U.S.C. §§ 2113 (a) and (d)]--has been before this Court. The appeal now comes from the government after dismissal of the indictment by the United States District Court for the Eastern District of New York (Weinstein, J.). Dismissal came on pretrial motions which flushed out new facts and raised new issues never previously before this Court, though foreshadowed in some degree by prior argument before this Court.

Fred Fernandez has been tried three times previously on the now dismissed indictment for bank robbery. The first trial (Bruchhausen, J.) resulted in a hung jury, the second and third convictions and sentences to 20 years in prison (Costantino, J. and Travia, J.) were reversed by this Court. United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972) hereinafter Fernandez I; United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973), hereinafter Fernandez II.

The prosecution of the defendant in this case, now halted on the eve of its fourth trial, has been marked throughout by unfairness and impropriety on the part of the government in the suppression of evidence rightfully available to the defense--all in a manner calculated to mislead not only the defense, but the courts below and this Court when these issues came before it on appeal. Among the pieces of evidence withheld were items crucial to the test of the reliability of eyewitness identifications (A 25-28).[1] This Court has noted defense counsel's complaints and has recognized the pivotal role of eyewitness testimony in this case (Fernandez I, 456 F.2d 442-444), but on each occasion has reversed on other grounds. The court below has now dismissed the indictment upon its review of and the government's refusal to disclose material not previously in the record before this Court that bears squarely on the issues of fairness, suppression of evidence and reliability of the eyewitness identification.

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1. "A" followed by a number refers to Appellant's Appendix. "AA" followed by a number refers to Appellee's Appendix.

Specifically, the court below dismissed the indictment on the government's refusal to disclose material that court found to be Brady material after it had reviewed two pages in the government's F.B.I. file (Court Ex. 1C pp. 45 and 46) which indicated that two "reputable witnesses" (A 51), also described as "public officials" (AA-92), had identified a person other than the defendant as the bank robber, supposedly the defendant, depicted in the surveillance pictures. The court below further found, after reviewing pages 45 and 46, that the informants were "not the normal type informants" (AA-90) and that "it is absolutely incredible to me that there is any substantial danger to people of this kind" (A 46). Responding to an offer by the court, the government rejected a hearing on the factual issue of the asserted danger (A 62-65). The court further found that the government had made "a private agreement" with the informers (A 61) that it would not reveal their names and declared "but that kind of arrangement can't bind the court" (A 62).

In this hearing, moreover, the court below weighed the claim, made for the first time in this prolonged prosecution, that at least one reason for the government's pursuit of the defendant is that he has the misfortune to be esteemed by the local authorities as a "black radical" (AA-92). An affidavit by defense counsel supporting the motion for the hearing recited a long record, beginning in 1967, of harassment by the

police and state prosecutor's office on charges that range from anarchy (under the New York State "Gitlow" statute) to disorderly conduct. After litigation which included appeals to the U. S. Supreme Court (on the anarchy issue) and reversals of convictions on appeal in the state courts, the indictments in these state cases had been dismissed when the court below dismissed the present, Federal, indictment (AA-7-27).

Subsequent to filing the notice of appeal and after the District Court had lost jurisdiction, appellant filed below, as a sealed exhibit, "affidavits from the two informants [alleging] that disclosure of these informants' identities would still pose a hazard to them."[2]

As to any record of the defendant appearing dangerous because of his criminal record , the sole conviction at the present time in his record is one in 1962 for assault in the third degree, when appellee was 17 years of age (A 22). In any event, the government rejected, as noted above, the opportunity to hold a factual hearing on the asserted danger (A 62-65).

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2. In a hearing on February 21, 1974 before Judge Weinstein, the Judge said he had not considered the affidavits in his determination. Appellee requests leave to file the minutes of those proceedings when they are available.

ISSUE PRESENTED

Did the court below abuse its discretion, under all the circumstances, in ordering the production of Brady material--to wit the names of informants, the reports of whom were produced in camera and are before this Court for the first time--and, upon the government's refusal to comply, dismissing the indictment?

PROCEEDINGS BELOW

Following this Court's second reversal of defendant's conviction and on July 11, 1973, defendant filed an omnibus motion in the court below requesting among other relief "a dismissal of the indictment based upon the continuing unfair practices of the government to be more particularly developed at . . . hearing . . ." (AA 5-27)

The court below granted defendant a hearing on the contentions made, requiring the defendant to assume the burden of proof of its contentions (AA-65).

Defendant subpoenaed certain witnesses and, among other records in the possession of the government, the complete F.B.I. file of the bank robbery prosecution. The latter was turned over to the trial judge for review in camera against the charge by defense counsel that the prosecution had been concealing material it should have produced under Brady v. Maryland, 373 U.S. 83 (1963).

This was the second time a District Court judge had

reviewed that file. The government had turned over a folder to Judge Travia prior to the third trial after a claim by defense counsel that exculpatory material was being suppressed (AA-2, 3). Judge Travia ruled on November 8, 1972:

> "And from what I find in that file--in that folder, not that file--I don't know how many papers, I went through all of them, I don't find anything in there that would be of that nature [exculpatory], but I could say to you, Mr. Stechel, if I were in your position, I would turn over that whole folder to her [defense counsel]. There's nothing in it that would hurt you; but that's up to you. My suggestion would be that there's nothing in it--I think I was asked to check for that purpose. I'm going to return that folder of papers to you." (AA-2, 3)

This "folder" was not before this Court on either appeal. It is true that the defendant and then appellant maintained in the last proceeding before this Court that certain exculpatory material was not turned over to the defense. That claim was not based on any knowledge of the contents of the "folder" but, rather, upon an affidavit of the arresting F.B.I. Agent Sweeney discovered for the first time by defense counsel after the first two trials. The affidavit dated January 18, 1971 and subscribed to by Agent Lawrence Sweeney stated, with respect to the photograph identified as a picture of the defendant, that two informants had identified the same photograph as a picture of Arthur Teare (See App. Brief Fernandez II p. 3).

Defense counsel sought the names of those informants by application to Judge Travia. In opposing the revealing of

the names of those informants, Mr. Stechel for the government stated:

> "We fear for the safety of various people named in these, in light of the defendant and his associates.
>
> "As a result, the F.B.I. doesn't make a policy of turning over names of informants." (AA-3)

On the basis of this statement alone, Judge Travia denied defense counsel's motion for the names of the informants.

The government argued to this Court on its last appeal 1) that the identity of the informants named in Sweeney's affidavit was not exculpatory and 2) that the fact that the informants had identified two other bank robbers (since convicted of the crime), gave the government appropriate concern for the safety of the informants (Resp. Br. Fernandez II p. 35).

In its last opinion, this Court stated as to the government's opposition to revealing the names of the informants:

> "In a pretrial motion defense counsel requested that the government be compelled to disclose the names of the two individuals. The government opposed on the ground that the individuals would be in grave jeopardy if their names were disclosed and the Court refused to compel disclosure" (Fernandez II, 380 F.2d 378)[3]

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3. As to the last statement of the Court, no evidence by affidavit or otherwise had been presented either to the court below or this Court of the probability or possibility of any danger to the informants then identified only by Sweeney in his affidavit of January 18, 1971.

Thus, when this issue was last before this Court, it was raised by the defense only on the basis of inferences drawn by defense counsel from F.B.I. Agent Sweeney's report. The defense and this Court did not know that the names of the informants and their reports were in the F.B.I. file and that the informants were "public officials," "not the normal type informants".[4]

Moreover, Judge Weinstein found--and it was conceded by the government--that the government had made a prior agreement with the informants not to reveal their names. The court below held that such an agreement could not bind a trial court. Before dismissing the indictment for failure to comply with its order, the court below offered a hearing to the government on the issue of the danger to the witnesses. The government rejected such a hearing (A 64).

Accordingly the record below reveals a finding by the court that:

> ". . . the names of these witnesses seem to me to constitute Brady material and I believe that the government has an obligation to turn it over." (A 51)

The court below also found as to the informants, based on what the court had read in the sealed file (Court's Ex. 1C):

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4. The file itself of the informants' reports pp. 45 and 46 of Court Exhibit 1C is sealed, not available to counsel for appellee but is available for perusal by this Court. The quoted descriptions of the informants were made by Judge Weinstein at the hearing.

> "It just is absolutely incredible to me that there is any substantial danger to people of this kind [A 46] . . . I really think this is farfetched on the part of the government" (A 47)

The court below further said as to the importance of these witnesses against the background of the whole case:

> "In view of the history of this case, it is clear, if nothing else is clear, that there is a substantial issue as to identification. . . A contemporaneous identification by two reputable witnesses seems to me of great importance to the defense of this case" (A 51) (emphasis supplied).

In summing up its position before finally granting defendant's motion to dismiss, the court below stated:

> "THE COURT: I am not going to decide on those issues because I don't believe that they are decisive. I believe that this case is being tried de novo and that the government should not be punished for mistakes in the past.
>
> The issue is whether this case presently before me can be properly tried. And my view is that it cannot be properly tried unless the names of these two people are turned over to you. I think there is an inherent difficulty in this case because of the lapse of time. The Wade problem is extremely difficult, the whole identification problem is very difficult because these government identification witnesses, as well as defense identification witnesses are going to find it very difficult to identify on the basis of what they remember of the event. They are going to identify to a large extent on the basis of what they see in the Courtroom.
>
> I am not trying to prejudge that and I am not saying that I would grant a motion under Wade, but in view of all of those problems, a contemporaneous failure to identify is very serious. Would these people know this defendant himself?
>
> MR. PATTISON: I think not. That would be part of cross-examination, direct examination and so forth.

THE COURT: We don't know. Defense counsel if defense counsel had the names she could find out whether these people knew Fernandez as well as Tier and did not identify him as Fernandez but as Tier, then it would be very persuasive evidence.

MR. PATTISON: Of course.

THE COURT: You leave me no alternative but to grant defendant's motion.

MR. PATTISON: I would ask for a stay now until 10 a.m. for me to check with our office, with Mr. Morse. Since Mrs. Piel would be here now, rather than waste any more time, I just wanted to meet with the Court so that the Court could know how we viewed the case.

THE COURT: Defendant's motion to dismiss is granted for the reason stated. Court exhibit 1-C is directed to be resealed by the Clerk, two pages, 45 and 46, for purposes of appeal, and the order of dismissal is stayed until 10 o'clock tomorrow. Both of you will be before me 10 o'clock tomorrow. We have somebody from the marshal's office here." (A 54-56)

The record thus clearly shows that the court below decided the issue of the disclosure of the informants' names against a background of facts different from that presented to this Court on the last appeal. That appeal by the defendant in no way involved the contents of Court's Exhibit 1C now before this Court for the first time. Moreover it is now clear that the government has in reality refused to turn over the names of the informers because of its promise and undertaking to those informers, as was brought out in the record for the first time below.

In addition to the above, defense counsel found

Brady material never before revealed by the government among the papers turned over in Court's Exhibit 1C. The material involved a statement taken by Agent Lawrence Sweeney from a witness at the bank robbery--a man who appears closest to the robber identified as Fernandez in the surveillance film (A 25). That witness, a Mr. Max Schier, was interviewed by Sweeney a little over a month after the robbery. He said that the bank robber who was supposed to be Fernandez was 5' 6" tall. Fernandez is more than 6' tall (Fernandez I, 456 F.2d 643 n.4). Furthermore, it appeared that he was shown pictures of Fernandez at the same time and he did not recognize him as the bank robber (A 26). This exculpatory material was not turned over to defense counsel before the three prior trials, two of which trials took place before Mr. Schier's death in September 1971 (A 26-28).

Although the court below found that this concealment on the part of the government was "wrong", it did not dismiss the case on that ground (A 28-29). The court below went on to suggest, however, that it would be appropriate to present such issues to this Court if the issue of the non-disclosure of the informants were to be brought before this Court (A 34).

This Court's attention is called to the continuing denial of the government, through three trials and two appeals to this Court, that neither §3500 material nor exculpatory material was ever withheld from the defense (Resp. Br.

Fernandez I p. 21, Resp. Br. Fernandez II pp. 24, 25, 26). Such denial takes on new significance in the light of the government's present appeal from the dismissal of the indictment for failure to turn over what Judge Weinstein found to be Brady material. The government contends on this appeal that it is "law of the case" that the informants' names be withheld. Appellee urges that, whatever this Court said in Fernandez II, it reconsider the entire issue in the light of the new evidence before the court below.

On this issue, this Court said:

> "In particular we urge the government to be forthcoming in disclosure except when, as in the case of the informants discussed in Section IV (1) above, this might entail danger to other persons or the drying up of important sources of information." (Fernandez II, 480 F.2d 741)

The court below has found in reading the reports of those informants, never before seen by this Court, that they were reports of "public officials"--suggesting that they are reports of police officers who would not be in danger or in the category of "important sources of information." Moreover the court below found that it was not the threat of danger that motivated the government's insistence on the denial of the names--but rather an agreement between the government and the informants not to reveal their names. Such an agreement, said the court below, could not be binding on the court. Thus the government made its choice not to reveal the names and the court below then dismissed the indictment.

ARGUMENT

THE COURT BELOW DID NOT ABUSE ITS DISCRETION OR OVERRULE THE "LAW OF THE CASE" IN ORDERING THE DISCLOSURE OF THE NAMES OF INFORMANTS WHO IDENTIFIED A SURVEILLANCE PICTURE OF THE ROBBER AS A PERSON OTHER THAN THE DEFENDANT.

This Court made a ruling that the government need not reveal the names of the informants identified in the affidavit of F.B.I. Agent Sweeney as having named the three perpetrators of the bank robbery shown in the surveillance pictures as Jerome Reide, Arthur N. Teare and Horsun Howard (Fernandez II pp. 738, 741). In so doing this Court accepted the representations of the government that the informants "would be in grave jeopardy if their names were disclosed." (Ibid. p. 738)

This issue (the names of the informants) came up again de novo in the proceedings below on motions of defense counsel, again requesting exculpatory material and subpoenaing for the first time the F.B.I. file for inspection in camera by the trial judge.[5]

The folder (Court Ex. 1C) was inspected by Judge Weinstein who ordered, inter alia, that another report of

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5. That same file had been turned over to Judge Travia before the third trial, looked at in camera and returned to the government. Its contents were never before this Court, nor was any point of it made by appellant who urged 21 other points on appeal.

Sweeney contained in the file on an interview with one Max Schier (since deceased) be turned over as Brady material to defense counsel. As to that report, defense counsel argued that the defense was irreparably injured in not seeing this report before the first two trials in June and July 1971, when the witness (Max Schier) was still alive. He died in September 1971 (A 26). The court below held that thus withholding of the report to be "wrong" but offered to attempt to correct the situation by appropriate instructions to the jury (A 28).

In addition, the court below looked over the reports of the informants who had identified the robbers from the surveillance film as Jerome Reide, Arthur N. Teare and Horsun Howard (not Fernandez) and determined that they (the informants) were "public officials" not the "normal type of informants" (AA-90, 92). Judge Weinstein further found that he could not "imagine these people involved here being in any difficulty at all. It is absolutely incredible to me that there is any substantial danger to people of this kind" (A 46).

In sum, the court below found there was little danger to the informants, that a major reason for failure to disclose the informants on the part of the government was a promise not to do so. The court found, further, that where there was a "substantive issue as to identification" the disclosure of the identity of the informants was essential as Brady material for the defense.

This Court has recently held that the issue of whether or not certain material alleged to be exculpatory falls into that category is for decision of the District Court in the first instance. United States v. Brawer, 482 F.2d 117, 136 (2 Cir. 1973); cf. Giglo v. United States, 405 U.S. 150 (1972).

The issue of the materiality of the names of the two informants was before this Court before in Fernandez II only on the peripheral affidavit of Agent Sweeney dated January 18, 1971. Sweeney stated merely that the two unknown persons were "informants". The F.B.I. file (Court's Exhibit 1C), on the other hand, had additional information bearing on the issue of the materiality of the evidence under Brady, and the names of the informants were found by the District Court in balancing all the elements involved to be material, appropriate and necessary for the defense. See "Brady v. Maryland and the Prosecutor's duty to disclose", 40 Chi. L. R. 112 (1972).

The rule of "the law of the case" is not a sacred doctrine but one which is peculiarly within the power of the deciding court to interpret. United States v. E. I. duPont, 366 U.S. 316 (1961) mod. den. 366 U.S. 956 (1961). Changes in the law and facts may be considered in this regard. Banco National de Cuba v. Farr, 383 F.2d 166 (2 Cir. 1967), cert. den. 390 U.S. 956, reh. den. 390 U.S. 1037 (1968). This Court, of course, may construe its own mandate, Bailey v. Henslee,

309 F.2d 840, 443 (8 Cir. 1962).

Moreover, the mandate should "be interpreted reasonably and not in a manner to do injustice." Wilkinson v. Massachusetts Bonding and Ins. Co., 16 F. 2d 66, 67 (5 Cir. 1926). Cf. In re Sanford Fork and Tool Co., 160 U.S. 247, 256 (1895); Kresge Co. v. Winget Kickernick Co., 102 F. 2d 740 (8 Cir. 1939), cert. den. 308 U.S. 557 (1939).

> "The law of the case is not based on any constitutional authority, but is only a doctrine of judicial administration based on the practice of the courts". Banco National Cuba v. Farr, p. 178.

The doctrine ("law of the case") is not a limitation on this Court's power. A court may always reinterpret or change its opinion in the light of a new or different record. King v. West Virginia, 216 U.S. 92, 100 (1910).

Appellee urges upon this Court the equity and justice of the ruling of the court below based upon new facts and circumstances not known to this Court when it considered the then appellant's twenty-one points on appeal in Fernandez II.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Appellee

March, 1974

2 Copies Received

Date March 6, 1974

Firm Hon Edward John Boyd, U. S. Atty

By _____